These considerations make the first ground of the decision—that the enforcement suit is exclusive and that therefore the court lacks jurisdiction to entertain a suit for declaratory relief—somewhat problematic. Yet the factors relied upon by the court seem to be a proper basis for denying declaratory judgment in the discretion reserved to the courts by the Declaratory Judgment Act, which represents the second ground of the present decision.

P. B. R.

CONSTITUTIONAL LAW—RIGHT OF COUNSEL—RIGHT TO EFFECTIVE COUNSEL—[United States].—The petitioner, an assistant United States Attorney, was indicted on a charge of conspiracy to defraud the government. At the beginning of the trial, the court suggested that the petitioner's attorney represent a co-defendant, Kretske, whose attorney had withdrawn from the case. When petitioner objected, the court withdrew its suggestion. However, petitioner's attorney, after consulting with Kretske, suggested that he be appointed to represent the latter. The trial court thereupon appointed him attorney for Kretske. Petitioner did not object during the trial which lasted a month. Fifteen weeks after the trial had ended, he appealed on the ground that the court's action without his approval had denied him the right to counsel guaranteed by the Sixth Amendment. The appeal was denied and the petitioner brought writ of certiorari to the Supreme Court. *Held:* sharing of counsel without express consent violated the Sixth Amendment. *Glasser v. United States.*[1]

The importance of the right to counsel as shown by the historical development in the English common law and in American colonial history[2] insured its inclusion as a fundamental right guaranteed by the Bill of Rights.[3]

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1. (1942) 62 S. Ct. 457, 86 L. Ed. 405. (Mr. Justice Frankfurter and Chief Justice Stone dissenting.)

2. In Powell v. Alabama (1932) 287 U. S. 45, 61, the majority opinion contains an interesting discussion of the development of the right to counsel in the American colonies, and cites the following authorities: Zephaniah Swift, *A System of the Law of Connecticut,* (1795-1796) Vol. II, Bk. 5, "Of Crimes and Punishments," c. XXIV, "Of Trials," 398-399; Del. Const. (1776) Art. 16, Ga. Const. (1798) Art. 3, §8, Md. Const. (1776) Art. 19, Mass. Const. (1780) Part I, Art. 12, N. H. Const. (1784) Part I, Art. 15, N. Y. Const. (1777) Art. 34, Pa. Const. (1776) Art. 9; North Carolina, Session Laws 1777, c. 115, §85 (North Carolina Rev. Laws, 1715-1796, Vol. 1, 316), South Carolina, Act of August 20, 1731, §XLIII Grimke, *South Carolina Public Laws,* (1682-1790), 130 (right to counsel assured in capital offenses), Va., Chap. VII §III, *Laws Of Va.,* 8th Geo. II, 4 Hening, *Stat. at L.,* 404 (petitioner in capital offenses allowed counsel on his petition to court), "An Act Declaratory of Certain Rights of the People of the State" s. 6 *Rev. Pub. Laws,* Rhode Island and Providence Plantations, (1798).

3. In Powell v. Alabama (1932) 287 U. S. 45, the Supreme Court seemingly placed the right to counsel, as it might arise in state cases, within the protection of the due process clause of the Fourteenth Amendment. This action was in accord with the practice of placing the "fundamental" rights contained in the first eight Amendments to the Constitution within the scope of the Fourteenth Amendment. However, in Betts v. Brady (June 1, 1942)

However, the accused may waive the right to counsel. But in protecting such a fundamental right the Supreme Court has been extremely cautious in permitting its waiver. In *Johnson v. Zerbst*[4] the Supreme Court stated that the determination of whether there has been an intelligent waiver of the right must depend on the particular facts and circumstances of the case, including the background, experience, and conduct of the accused. Under this doctrine of examining every case upon its merits, the Court has determined that the right cannot be waived unless the accused knows that he possesses the right irrespective of external circumstances such as his ability to pay counsel's fees.[5] Consequently, the trial court must inform the accused of his right and appoint counsel unless the accused expressly waives his right,[6] which waiver must be noted on the record of the trial court.[7] However, if, after being informed of his right, the accused freely and voluntarily pleads guilty without asking for or receiving the assistance of counsel, his conduct is an intelligent waiver of his constitutional right.[8]

From these decisions it is apparent that the petitioner in the instant case did not waive his right to counsel. There was no express waiver noted in the trial court record. While an implied waiver might possibly be read from his failure to object to sharing his counsel with Kretske, the Supreme Court is undoubtedly sound in its stand that it must indulge every possible presumption against the waiver of a fundamental right.[9]

Since the petitioner had not waived the right to counsel, the Court had to decide next if he was denied the right to effective assistance of counsel which is an implicit element of the right.[10] It is rather apparent that in the instant case the Supreme Court overlooked the realities of the situation in its desire to safeguard fundamental rights. The accused was an experienced attorney particularly skilled in criminal law. By virtue of such experience, he knew or should have known that, while there are certain disadvantages in the sharing of counsel between defendants in a conspiracy trial, there are certain advantages to be gained as well.[11] The accused raised no objection at the trial to any of his attorney's actions in the conduct of the trial.[12] In view of these circum-

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62 S. Ct. 1252 the Court placed the right to counsel outside the protection of the Fourteenth Amendment. The decision in Betts v. Brady can be questioned severely in view of the Court's past characterization of the right to counsel as "fundamental," in Powell v. Alabama, supra, at 70, and Grosjean v. American Press Co. (1936) 297 U. S. 233, 243-244.

4. (1938) 304 U. S. 458.

5. Walker v. Johnston (1941) 312 U. S. 275.

6. Holiday v. Johnston (1941) 313 U. S. 550.

7. Johnson v. Zerbst (1938) 304 U. S. 458.

8. Erwin v. Sanford (D. C. N. D. Ga., 1939) 27 F. Supp. 892; Harpin v. Johnston (1940) 109 F. (2d) 434, cert. den. (1940) 310 U. S. 624.

9. Glasser v. U. S. (1942) 62 S. Ct. 457, 465, 86 L. Ed. 405.

10. Louie Yung v. Coleman (D. C. S. D. Idaho, 1934) 5 F. Supp. 702; Thomas v. District of Columbia (App. D. C. 1937) 90 F. (2d) 424; Neufield v. U. S. (App. D. C. 1941) 118 F. (2d) 375.

11. That is, planning a joint defense and insuring against reciprocal recrimination.

12. Besides William Stewart, the attorney in question, the accused was

stances there is some question as to the soundness of the reasoning of the majority opinion in determining that the sharing of counsel in the instant case means that the accused was denied the effective assistance of counsel. The petitioner's appeal on the ground of denial of his rights under the Sixth Amendment was obviously a lawyer's afterthought.

Further, the decision is regrettable in the sense that it comes on the heels of a recent line of cases in which the Supreme Court looked very much to the realities in order to determine if the right to counsel had been denied. In *Powell v. Alabama*[13] the Supreme Court went behind the record to examine the background of the defendants before determining that they had been denied the right to counsel since counsel had been appointed in too haphazard a fashion and at too late a date to provide for adequate pretrial preparation, which is a fundamental part of the right. In a later case the Supreme Court held that a denial by the trial court of a continuance requested by the defendant did not deprive the defendant of his constitutional rights if it did not appear that such continuance would lead to a stronger defense or lead the defense to obtain more witnesses.[14] In a matter involving the competency of attorneys assigned to represent the accused the Supreme Court held that the failure of counsel to reserve certain exceptions was, at worst, according to the facts, mere negligence or error of judgment and not a denial of the effective assistance to counsel.[15]

This line of cases involved primarily the right to counsel as contained in the Fourteenth Amendment. It may well be that the Supreme Court in the instant case arising under the Sixth Amendment is proceeding upon the theory that "* * * constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry* * *"[16] The dissenting opinion in the instant case offers the better view, however, when it states that the guarantees of the Bill of Rights are not mere abstractions but must be viewed objectively. Only by such treatment can their importance be preserved and the guarantees be prevented from becoming hollow refuges from the law.

E. P.

CONTRACTS—CONTINGENT FEE FOR EXPERT WITNESS—[Missouri].—Plaintiff, a psychiatrist, brought suit on a contract providing compensation of $25,000 for his services as an expert witness in a will-contest, payment of the fee being contingent upon the success of that litigation. His services consisted of reading depositions, hearing the testimony of witnesses, and holding conferences with witnesses and counsel, upon which his opinion

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also represented by one George Callaghan and himself. However, Stewart was the most active defense attorney during the trial.

13. (1932) 287 U. S. 45.

14. Avery v. State of Alabama (1940) 308 U. S. 444.

15. Peterson v. State (1933) 227 Ala. 361, 150 So. 156, cert. den. (1934) 291 U. S. 661.

16. Snyder v. Mass. (1934) 291 U. S. 97, 116.